THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE INSPECTOR GENERAL

REPORT ON THE PROPOSED DEVELOPMENT OF GREYLOCK GLEN

Joseph R. Barresi
Inspector General
February, 1991

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February 6, 1990

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Commissioner
Department of Environmental Management
100 Cambridge Street
Boston, MA 02202

John I. Carlson, Jr.
Commissioner
Division of Capital Planning
and Operations
One Ashburton Place
Boston, MA 02133

Dear Commissioner Webber and Commissioner Carlson:

I am writing to recommend that you not sign the draft land disposition agreement (LDA) negotiated between the Dukakis Administration and Heritage Development Group, Inc. (Heritage), for the disposition and development of property at Greylock Glen. I also recommend that you cease negotiations with Heritage. After an extensive review of documents related to the proposed development, I have determined that execution of the draft LDA would violate the requirements of Chapter 676 of the Acts of 1985, and the resulting agreement would be invalid.

Enclosed you will find my report on the proposed agreement which elaborates on these and other findings.

Sincerely,

Joseph R. Barresi
Inspector General

Enclosure

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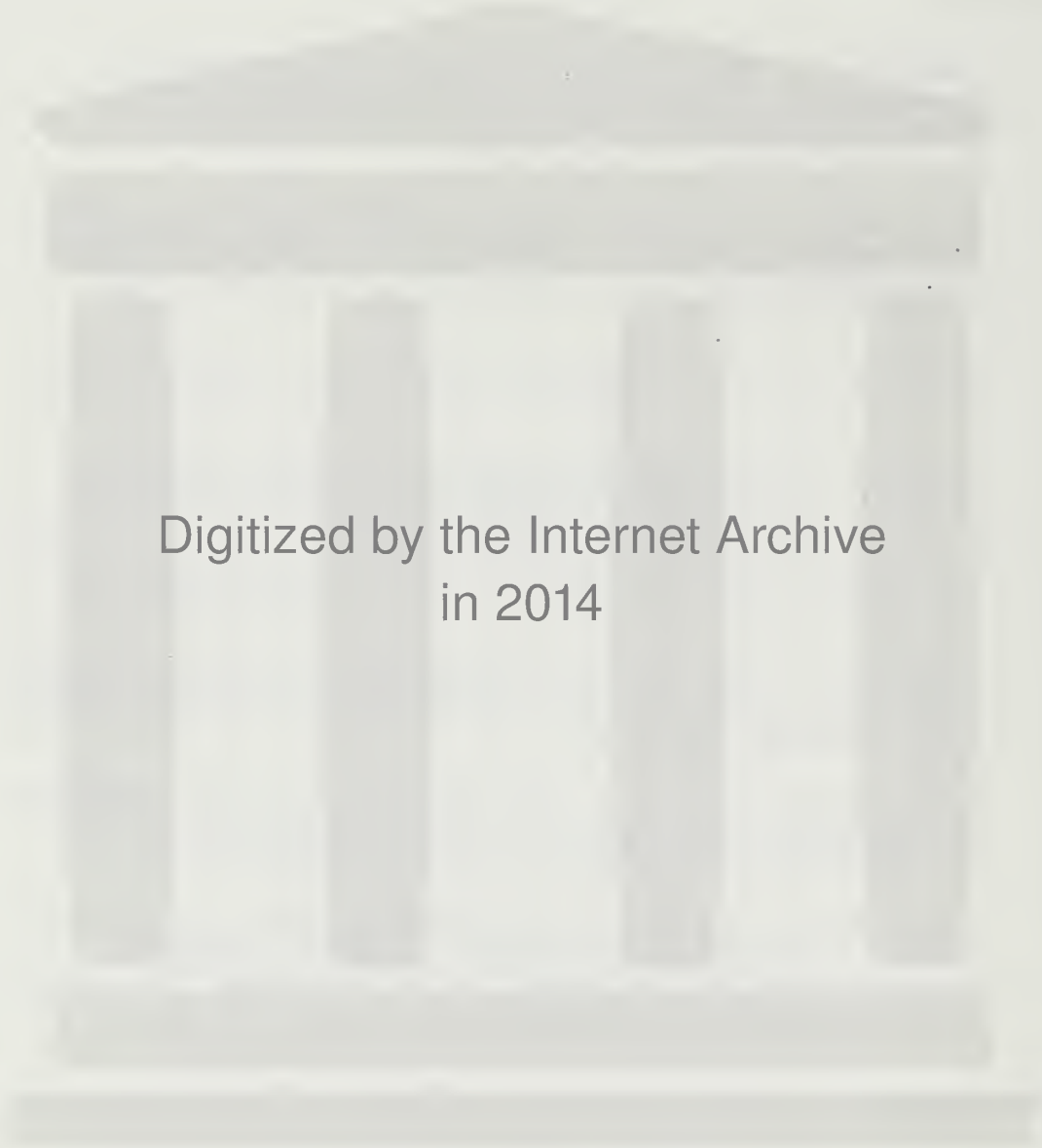

INTRODUCTION

On December 21, 1990, Governor Dukakis released a draft land disposition agreement (LDA) for the development of the 1040-acre Greylock Glen in the Town of Adams. The draft LDA represented the culmination of three and one-half years of negotiations between the Dukakis Administration and Heritage Development Group, Inc. (Heritage).

Over the past several months, the Office of the Inspector General has reviewed every document concerning this project in the custody of the Executive Office of Environmental Affairs (EOEA), the Governor's Office of Economic Development (GOED),[1] the Department of Environmental Management (DEM), and the Division of Capital Planning and Operations (DCPO). These documents, which date back as far as 1984, revealed the following:

1. Heritage was granted a preliminary designation as developer of Greylock Glen despite clear violations of the master plan and the developer selection process.

2. The State and Heritage have negotiated fundamental changes in Heritage's original proposal; the current draft LDA is not the offer the State accepted in 1987.

3. The current Heritage plan violates the master plan.

4. The Dukakis Administration failed to identify the source of funds to satisfy its $16.5 million commitment to the project.

5. The project is a high-risk investment for the State.

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[1]During the course of the Greylock Glen project, Alden Raine, the Director of GOED, was appointed Secretary of the Executive Office of Economic Affairs. To avoid confusion, this report will refer to Secretary Raine as the Director of GOED.

6. The draft LDA provides for a low direct financial return to the Commonwealth; the low return has not been justified.

7. There is a substantial question whether the proposed arrangement would violate the State's designer selection and construction bid laws.

8. The Dukakis Administration's failure to follow a coherent development plan is largely responsible for the delay and controversy that has characterized this project.

The first three of these findings are substantial legal flaws, each of which independently would render void any disposition agreement signed as a result of this process.

BACKGROUND

In 1985, the Dukakis Administration drafted and filed legislation to authorize the acquisition, disposition and development of Greylock Glen before reasonably firm plans were formulated and the project's feasibility was demonstrated. Given the project's uncertainty, the Inspector General recommended a series of safeguards which were enacted in the statute, Chapter 676 of the Acts of 1985. In effect, a two-stage process was created: the project received preliminary approval from the Legislature, but its continuation was conditioned upon the satisfaction of planning and procedural requirements.

Section six of the statute required DEM to develop and submit to the General Court a report on the proposed development. The report was to include a master plan "outlining the proposed uses of the lands as well as the facilities and improvements thereon with sufficient specificity so as to serve as a basis for the solicitation of proposals by private parties for the development of the lands." The statute also required that the report include information on, among other things, "(1) anticipated publicly paid capital and operating costs over the first five years of operation; [and] (2) sources and applications of revenues . . . ."

The legislation clearly established the master plan as the major control over the project. The act required that the plan "serve as a basis for the solicitation of proposals" from developers; authorized the Commissioner of DEM to negotiate with and select a developer "so as to best <u>implement the plan</u> and the purposes of this act;" and established as a condition precedent to any disposition that the Commissioner find that "the disposition <u>implements the plan</u>." (Emphases added.)

The importance of the report and master plan was underscored by material former DEM Commissioner James Gutensohn submitted to Senate Ways and Means Committee Chairman Patricia

McGovern on July 5, 1985, supporting passage of the then-pending legislation:

> The master plan must be filed with the Clerks of the House and Senate . . . , thus giving opportunity for legislative comment and criticism. . . .
>
> The assurance that DEM would control the master planning of this large parcel was a key element in enlisting the support of the major environmental organizations. The master planner must balance a variety of interests, e.g. economic development, recreational, environmental, etc., . . . The master planner must work with DEM in reconciling these competing interests in the preparation of an economically feasible, coherent and environmentally sensitive master plan.

The draft LDA released by Governor Dukakis on December 21, 1990, is long (96 pages with some appendices omitted) and rather complex. The deal negotiated with Heritage has two major components in addition to the draft LDA: a revised master plan -- significantly different from the master plan DEM prepared pursuant to Chapter 676 -- which has not yet been accepted by the State, and an as-yet unnegotiated master lease (and any interim leases and licenses) to Heritage of all the land which will remain publicly owned.[2]

Some of the salient features of the negotiated deal include:

-- The project would not proceed unless certain conditions are met within a five-year period after the LDA is signed.

-- The State would, prior to closing, obtain written commitments from "appropriate public authorities and utility companies" to fund and construct

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[2]The draft LDA specifies some of the major terms to be contained in a master lease. It also specifies that if the State and Heritage do not successfully negotiate the terms of the lease within a five-year period prior to the transfer of any property to Heritage, the project would terminate.

specified off-site roadways and utilities. If the project were to proceed, the Commonwealth would be likely to fund some of these improvements.

-- The State would acquire additional property interests, "subject to appropriation." The estimated costs of these acquisitions is approximately $300,000.

-- The State would commit $16.5 million toward on-site development costs. The State would be responsible for developing specified roadways and utilities, the "norpine" ski area, three ponds, and amphitheater, and for reconstructing reservation trails. Some of the roadway and utility work, and the ponds would be developed early in the project. The norpine ski area, amphitheater and other roadway and utility work would be undertaken only as the project continues to develop and condominium units are sold by Heritage.

-- The State would convey to Heritage at the closing approximately 385.4 acres of property. Any consideration for the conveyance would be contingent upon future sales of condominiums or unimproved land. Heritage would be granted 50 years to develop the property.

-- Heritage would be required to construct only a golf course and maintenance building, a pro shop and nordic ski center, a country club and a village boulevard. Contingent upon the sale of condominium units, Heritage would construct, in phases, the nordic trails, 6,000 square feet of commercial space, a skating rink, an 80-room inn, and related roadways and utilities.

-- The State would lease all the publicly owned property to Heritage, which would operate any facilities developed on the land, including the golf course and country club, the norpine ski area, the nordic trail system, the skating rink and the amphitheater. Heritage would pay rent for the lease, but rental payments would be deferred for five to fifteen years after each facility opens.

The Commonwealth has already expended at least $6.1 million toward the development of Greylock Glen: $2 million of

the $8.5 million authorized by Chapter 676, $3.6 million for the taking of the 1040-acre Greylock Glen site, and $515,000 for a conservation restriction on 228 acres of farm land adjacent to Greylock Glen.

FINDINGS

1. Heritage was granted a preliminary designation as developer of Greylock Glen despite clear violations of the master plan and the developer selection process.

DEM employed a two-phase request for proposal process to select a developer for Greylock Glen. Twelve developers submitted their qualifications for review in August, 1986. Three were subsequently invited to submit more detailed proposals: Corcoran, Mullins, Jennison, Inc. (CMJ); E-K Associates; and Heritage. On November 7, 1986, DEM provided to the three firms a guide to the Phase II submission requirements and background material which included a copy of the statutorily-required master plan.

The guide stated that its "objective is to bring about proposals that are aesthetically satisfying, environmentally sensitive, appropriate to the region and to Mt. Greylock, within the parameters of the project master plan, financially viable, and enterprising in development content and staging." (Emphasis added.)

Concerning the master plan, the guide stated:

> Creativity is encouraged in translating the Master Plan to specific site plans and designs, and flexibility built into the plan gives scope for the imagination. At the same time, the Master Plan contains parameters to ensure conformance with the Commonwealth's objectives and standards for the site. Principal parameters consist of the Land-Use Zone Map, and densities and scales of development described in the text. . . . (Emphasis added.)

The master plan itself permitted competing developers to offer somewhat different approaches and schedules, but set certain limits: "Within the basic parameters established in this document, a certain amount of flexibility exists in terms

of the mix and type of on-site uses and the timing or phasing of the development." (Emphasis added.)

The master plan identified with particularity four land use zones -- the "principal parameters" which were not to be violated: an environmental protection zone, open space zone, development zone, and road zone. Each part of the property was assigned to a zone.

The plan was unequivocal about what would not be allowed in some of the zones. For example, the plan directed that in the forest area of the environmental protection zone, "No major construction of structures or site work that removes the tree canopy or significant numbers of trees will be permitted . . . ." In the scenic and recreational open spaces of the open space zone, the plan stated: "No structures, except small recreation-related buildings[,] will be permitted . . . ."

Two of the three firms invited to submit proposals, Heritage and CMJ, did so.[3]

Notwithstanding the clear prohibitions of the master plan, Heritage submitted a proposal which violated DEM's 1986 master plan on a grand scale. Whereas the master plan restricted residential development to 85 acres and set a maximum gross density of 10 units per acre, resulting in a maximum of 850 housing units, Heritage proposed to develop 1,275 units on 210 acres -- 50 per cent more housing on almost 150 per cent more land than the master plan allowed. This decision by Heritage resulted in other violations of the master plan as additional housing was sited in zones restricted for other purposes. In clear violation of the master plan, Heritage proposed to

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[3]E-K Associates withdrew from the competition in a letter to Commissioner Gutensohn dated February 19, 1987. The letter presciently stated: "After review of all permit procedures at the State and local levels, it has become obvious that many more permit involvements than were originally forecast must be carefully and successfully met. . . . The scope of work necessary between appointment of a developer and the completion of a land disposition agreement will be staggering . . . ."

construct housing in at least 16 locations designated under the plan as protected areas for forest or scenic and recreational open space.

Some of the participants in the selection process saw the discrepancy and noted the concerns. A handwritten document in DEM files, entitled "4/10/87 Greylock Glen Advisory Committee Meeting, Big Issues/Questions," includes among the issues: "[Heritage] - goes considerably beyond the Master Plan."

Harry L. Dodson, who assisted in the development of DEM's master plan, noted in a letter on April 29, 1987, to Richard A. Lockhart, then-DEM's project manager:

> Whereas CMJ's proposal adhered fairly closely to the landuse zones delineated in the 1986 [master plan], Heritage's proposal exceeds the land area recommended for development in the [master plan] by over 100%. This is a very significant departure from the [master plan] and will result in considerably greater environmental impact to the site.

Dodson appended to his letter a map which depicted conflicts he had identified between Heritage's proposal and the master plan.

An undated "preliminary comparison of the proposals submitted by the two Greylock Glen developers," found in the files of DEM's project manager, inappropriately dismissed the problem. Under the topic of "Conformity with the Master Plan," the document noted:

> CMJ's proposal is closer to the Master Plan in land use pattern and in numbers than HDG's. HDG's plan is closer in spirit to the goals of the Master Plan as a destination resort.

Whatever "spirit" some participants might have divined, the master plan itself sets forth prohibitions in black and

white.[4] Heritage's proposal should have been rejected for fundamentally violating the selection rules. Instead, on May 7, 1987, Commissioner Gutensohn wrote to Henry J. Paparazzo, President of Heritage, to confirm the "preliminary designation" of Heritage as the developer.[5] Gutensohn wrote, "The proposed scope of the recreation facilities, the creativity and quality inherent in the project design, the market approach and degree of commitment evidenced make Heritage's proposal a compelling statement."

The flaws in Heritage's proposal did not escape the notice of its competitor. In a May 13, 1987, letter to Commissioner Gutensohn, CMJ President Joseph Corcoran wrote "to strongly object to the unfair selection process . . . ." Mr. Corcoran noted that DEM had established clear design parameters for proposals, and identified nine areas in which he felt the Heritage proposal violated those parameters. He stated:

> It is ironic that our plan, which respected those limitations - indeed, which was based on those limitations, was not recommended, while a plan that substantially ignored the outlines was recommended - indeed, was recommended <u>because</u> it did not confine itself to the recommendations. (Emphasis in original.)

The selection of Heritage's proposal could well be termed unfair, as CMJ argued. The selection was also illegal. The statute required that the master plan "serve as a basis" for

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[4]One year later, in his June 24, 1988, letter to then-Secretary of Environmental Affairs James Hoyte concerning the final Environmental Impact Report for the project, Commissioner Gutensohn objected to the siting of two of the housing parcels which violated the master plan.

[5]Heritage's status today is unchanged; it has no binding agreement with the State. Commissioner Gutensohn's letter to Paparazzo stated, "The designation will become final upon completion of a land disposition agreement between the Commonwealth and Heritage."

the proposal selection process. It is a fundamental tenet of public contracting in Massachusetts that when specifications are advertised -- and in this context the master plan constituted a key set of specifications -- the contract must conform to the specifications.[6] The selection of Heritage, whose proposal did not comport with the advertised master plan, violated a bedrock principle of public contracting. In this case, the rules were changed after the race was run.

2. The State and Heritage have negotiated fundamental changes in Heritage's original proposal; the current draft LDA is not the offer the State accepted in 1987.

The stakes also were changed after the race was run. Significant changes have been made in Heritage's proposal during the three and one-half years of negotiation since Heritage was preliminarily designated the developer. In the context of public contracting, this is not only unfair but illegal. Even if the original selection were defensible, subsequent changes in the scope and business terms of the deal now require readvertising for proposals.

Heritage's proposal was scaled back and the State more than doubled its financial commitment.

On July 1, 1988, James Hoyte, then-Secretary of Environmental Affairs, issued his certificate on the final environmental impact report (FEIR) for the Greylock Glen project. Secretary Hoyte ruled that ". . . [Heritage] must plan for no more than 850 residential units in the resort/residential portion of the project." Thus, the number of housing units Heritage proposed for the site was scaled back

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[6]See, for example, Lynch v. Somerville, 326 Mass. 68 (1950).

from 1,275 to 850, the number originally allowed in the master plan.[7]

Heritage proposed the larger number of housing units, of course, to generate more money. When the State -- having agreed to the larger plan and income stream -- required that the project be reduced, Heritage got something in return. Although the downsizing simply conformed Heritage's proposal to the published ceiling on residential units, the State agreed to more than double its financial commitment to keep Heritage in the project.

In his certificate, Secretary Hoyte adopted this illogic. He wrote, "[T]he expectation that HDG alone would construct and finance most of the public amenities skewed the economics of the project such that the number of residential units was increased to 1275 to support amenities."[8] To scale back the housing, the Secretary stated, "[T]he Commonwealth must take the lead in planning, funding, constructing and managing the land based public amenities of the project. . . ."

State officials promised to provide an additional $10 million to the project, bringing the total State commitment to

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[7] Secretary Hoyte seemed to recognize that the Heritage proposal conflicted with the statutorily required master plan at least with respect to the number of housing units. He stated, "The MEPA review record provides a basis for and an opportunity to embrace again the essential elements of the legislation and the DEM Master Plan."

[8] In a memorandum to Governor Dukakis, written during the week of June 24, 1988, Alden Raine, GOED's Director and a principal advocate for a deal, strongly defended the project's scope. He wrote, "Among environmentalists who accept a development in principle, the most emotional issue remains the number of condo units. . . . The economics require it. Both Heritage and a DCPO consultant . . . have concluded that a 'full' package of 'public' amenities . . . is required if the residential market is to be established at all. In turn, to finance that package of amenities . . . the developer requires every one of those 1275 condos." (Emphasis in original.)

development costs under the draft LDA, exclusive of land acquisition, to $16.5 million.[9]

Major components of Heritage's proposal were dropped or significantly altered.

The character of the entire development significantly changed again in 1989. On September 20, 1989, Heritage submitted to the Secretary of Environmental Affairs a Notification of Project Change. The notification listed the revisions made in the project as approved in the FEIR. The principal changes identified in the notification included the following:

-- A 25-acre lake was eliminated; instead, three existing ponds were proposed for enlargement to result in approximately 8 acres of water area.[10]

-- Alpine skiing was eliminated, leaving only the "norpine/telemark component of the nordic ski

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[9]No written commitment by the State to Heritage to provide the additional funds was evident in the Administration's project files. However, the documents indicate that the commitment was hurriedly made to keep the project alive when Heritage was required to reduce the housing units.

In another memorandum to the Governor in late June, 1988, Raine advocated approving the 1,275 units, conditioned only upon unspecified tests to be met at the time 850 units were built. But within two or three days, two Administration memoranda were circulated identifying $6 million in uncommitted authorizations from DEM's capital accounts which might be tapped for the Glen project.

Subsequent documents suggest that State officials promised Heritage "at least $10 million," and a July 13, 1988, memorandum from the Deputy Commissioner of DCPO to Raine asked, "Are you still working on funding above 10 million?"

[10]The lake was a feature of DEM's 1986 master plan. DEM clearly underestimated the problems associated with creating the lake. Much time and effort was wasted on efforts to keep the lake in the face of State and federal legal constraints. In the end, Heritage and the State decided the lake was not necessary after all.

system." In addition, the number of ski lifts was reduced from three to one, snowmaking would be limited by the water supply (a direct function of elimination of the lake), night lighting would be "substantially reduced" and the trail area was reduced from 80 acres to 76 acres.

-- A base lodge and a meeting hall with a total of 19,000 to 25,000 square feet of building space were eliminated.

-- The predominant housing was changed from attached condominiums to "detached mountain homes."

With these and other changes, basic components of the original Heritage proposal have been eliminated or significantly reduced.[11]

Heritage's obligations were made conditional.

In addition to changing the components of the proposal, the current draft LDA has fundamentally changed when and under what conditions the components would be built -- if at all. Heritage's unconditional commitment to invest in the early development of major recreational amenities was a significant factor in DEM's selection of Heritage. In an April 30, 1987, memorandum to Dukakis, Gary Shepard of GOED explained the selection of Heritage over CMJ:

> The overriding difference between the two competitors was Heritage's up-front commitment to finance all the necessary recreational amenities in the first phase of the development. The feeling of the committee was that the Heritage proposal was recreationally driven

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[11]Other changes include a reduction in tennis courts from 23 to 10, and in swimming pools from 10 to two. Two facilities have been added to the project through the negotiations: an approximately 1,000-seat amphitheater to be constructed with State funds and a skating rink to be funded by Heritage.

whereas CMJ was more oriented to recreational phasing based upon condominium sales.[12]

By the time the Dukakis Administration had concluded its negotiations with Heritage three and one-half years later, the draft LDA could fairly be characterized as "oriented to recreational phasing based upon condominium sales." The purported advantages of Heritage's proposal over CMJ's have all but disappeared. The rationale for selecting Heritage in the first place has evaporated. The draft LDA lists three categories of improvements: Those that must be built are termed "required improvements;" others to be built only if certain numbers of housing units are sold are "conditional improvements;" and those which may be built at the sole discretion of Heritage are termed "optional improvements." Many of the improvements which Heritage originally proposed to start building within two years of a final agreement would now, under the terms of the draft LDA, either be conditioned on the sale of housing units or entirely "optional."

In a December 8, 1989, memorandum, former DEM Counsel Jeffrey Larson noted that the Massachusetts Audubon Society "hired legal counsel and intends to file a lawsuit to stop the project." One of the issues he anticipated as a possible basis for a challenge was that "the Commonwealth is not getting from [Heritage] what [Heritage] agreed to build." Larson noted that Heritage's preliminary designation as developer resulted because:

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[12]Apparently, no formal, detailed justification for the selection of Heritage was ever written. In a May 5, 1987, memorandum from DEM's project manager to Commissioner Gutensohn, recommending the tentative designation of Heritage as the developer, the project manager stated, "A full report on our review and findings regarding the two proposals is in preparation." However, no such report was found by this Office in its detailed review of the project files.

> . . . [Heritage] made a much greater up front investment than CMJ as CMJ proposed to phase in recreation components as units sold. CMJ's plan was more faithful to the DEM Master Plan, while [Heritage's] plan was deemed more creative. . . . During the period since the developer selection, the [Heritage] plan and program has changed to be more like the CMJ plan. The public recreational opportunities have become more modest. [Heritage's] plan is now based on phasing, as was CMJ's. Unlike their original proposal promising large up front investment, [Heritage] proposes to build recreational components in phases after it sells housing units.[13]

Larson was right. The draft LDA does not reflect the proposal the Commonwealth accepted from Heritage. If the agreement were signed, the Commonwealth would pay a lot more and would stand to receive a lot less in return.

Heritage was granted additional time to withdraw from the project.

In the final months of the negotiations, the draft LDA was changed to afford the developer a substantial period to back out of the project without penalty. The draft lists in Section 407 a series of conditions to be met prior to establishing a closing date for transferring the property to Heritage. Section 407(d) requires that the conditions precedent to

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[13]This point was restated in a February 13, 1990, memorandum by Jim Zien, Director of DCPO's Office of Real Estate Redevelopment. He noted:

> . . . At the time this proposal was made, the project scope and build-out approach had not yet changed, and [Heritage] was to be obliged to build all public recreation facilities, the Inn, and the full retail program within six years of a closing.
>
> In its new form, the project is market-driven, and [Heritage] is not obliged to build portions of the Nordic system, any of the Inn, and most of the retail unless certain residential sales thresholds are achieved. . . .

closing be satisfied within five years of the date of the LDA execution, unless the parties agree to an extension. Previous drafts, including one as late as August, 1990, had allowed only two years to satisfy the conditions precedent to closing.

In addition to increasing the time allowed for Heritage to satisfy the conditions, the draft LDA was changed from the August version to provide that the State could terminate the agreement: (a) after two and one-half years if Heritage does not declare in writing its intention to work diligently and in good faith to satisfy the conditions precedent for which it is responsible; (b) after three years if the developer fails to present evidence that it has initiated actions to prepare a preliminary subdivision plan; and (c) after three and one-half years if the developer has failed to file the preliminary subdivision plan with the Town of Adams.

Section 1802 of the draft LDA provides the remedies for breaches prior to the closing. It says that the nondefaulting party will be entitled to bring action for specific performance or to terminate the agreement. In the event of termination, damages are limited by this section to any direct costs incurred to satisfy the conditions precedent. However, this section was also amended from the August version of the draft LDA to provide that failure to perform during the first three years would not constitute a breach.

In short, the State would be bound under the draft LDA to give Heritage up to three years to decide whether or not to pursue the project. Heritage could back out of the project until that time. The State would be committed to Heritage, but Heritage would not be committed to the project. Heritage would, in effect, be granted an option to develop the property.

An option is not what the State advertised and not what Heritage proposed. Indeed, the State selected Heritage's proposal both for its program content and because it believed that Heritage had the financial capacity to invest the funds necessary to make the project work. Clearly, underlying

economic conditions have changed, and Heritage can no longer commit to the project. The State may not legally sign an agreement which departs so fundamentally from the deal which was advertised and the proposal which was selected.

3. The current Heritage plan violates the master plan.

Whatever else may be said about the various changes that have been negotiated in the project, the project is still different in major respects from DEM's 1986 master plan.

In his December, 1989, memorandum, DEM's Larson noted that a legal challenge could be based on the incongruity between Heritage's current approach and the original master plan:

> Chapter 676, in several places, requires development of the Glen to be in conformity with the Master Plan which was included in the RFP. . . . The Master Plan sets forth a program for development and creates land use zones.
>
> [Heritage] has created a revised Master Plan which deviates from the DEM Master Plan in terms of program, density and land use. . . . Groups opposed to the project can therefore argue that the [Heritage] proposed plan violates Chapter 676 which incorporates the DEM Master Plan.

Even Heritage has expressed doubt about the legal problems created by the discrepancies between the current scheme and both the master plan and the proposal which won Heritage its preliminary designation. An attachment to a July 27, 1989, letter to Raine from Heritage identifies "Commitments which [Heritage] needs from the Commonwealth to continue with the Greylock project." The last item on the list was: "A legal opinion should be obtained from DCPO counsel detailing (a) Revised Master Plan meets legislative objectives, and (b) that procedures for developer selection have been satisfied, before parties proceed with a revised program." Two weeks earlier, on July 14, another Heritage letter to Raine asked: "Does the

revised Master Plan and Program meet the goals of the Chapter 676 legislation?" (Emphases in original.)

In fact, DEM scheduled a December 28, 1990, hearing on the Greylock Glen project precisely because of the magnitude of the departure from the 1986 master plan.[14] In a November 9, 1990, memorandum to DEM Deputy Commissioner Kathy Abbott and Project Manager Gary Briere, DEM Counsel Nicholas Vontzalides wrote:

> While it is true that Chap. 676 only requires one public hearing to be held, it is assumed that the Master Plan which is the subject of said hearing shall remain substantially unchanged throughout the negotiation progress up to the execution of the L.D.A.
>
> It is my understanding that the original Master Plan, as adopted, has been substantially modified and, in fact, is still being modified.
>
> Unless we are comfortable that the original Master Plan has not been significantly altered, I recommend a re-use hearing based on [Heritage's] final plan.

Although officials properly concluded that Heritage's current plan is substantially different from DEM's 1986 master plan, they have mistakenly assumed that an administrative amendment to the 1986 plan could rectify the problem.[15]

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[14]That hearing has been continued to February 7, 1991.

[15]In a January 10, 1989, letter to Secretary DeVillars, Commissioner Gutensohn stated: "Chapter 676 . . . requires the development of a Master Plan which serves to solicit developers and provides guidelines for the development of the property. DEM developed a Master Plan in the Spring of 1986 to meet these requirements." After identifying some of the differences between the original master plan and the Heritage proposal, the Commissioner said: "These plan changes, as well as those required by the MEPA process or Wetland regulations, must be incorporated into the Master Plan through an amendment. I am working with my legal staff to develop an amendment process."

One year later, in a January 24, 1990, memorandum to Alden Raine, the new Commissioner of DEM, Richard Kendall, wrote: "In the near future, I will be called upon to formally amend

(continued...)

This assumption ignores the requirements of Chapter 676. If a new master plan is to be substituted for the original master plan, the new plan must be submitted to the General Court as part of a report on the new development plan, and the new master plan must form the basis for a solicitation of new development proposals.[16] The only alternative, if the project is to proceed, would be for the Legislature to authorize the State to conclude the negotiated deal with Heritage despite the failure to satisfy the requirements of Chapter 676.

4. The Dukakis Administration failed to identify the source of funds to satisfy its $16.5 million commitment to the project.

Section 901 of the draft LDA states:

> The Commonwealth has appropriated and exclusively committed for the Commonwealth's collective obligations hereunder, funds in the amount of at least sixteen and one-half million dollars ($16,500,000) . . . .

This statement is untrue. Having promised the developer an additional $10 million in funding for the project in 1988 when the number of housing units was reduced through the environmental review process, the Dukakis Administration was unsuccessful in identifying sources for the funds.

From the outset, the Dukakis Administration's additional funding commitment created problems. Considerable staff time appears to have been spent identifying and arguing about

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[15](...continued)
the Greylock Glen Master Plan referenced in Chapter 676 of the Acts of 1985."

[16]In effect, the State has rejected Heritage's original proposal and negotiated a new plan. As a legal matter, under these circumstances, a new round of advertising for proposals is required. See Phipps Products Corp. v. Massachusetts Bay Transportation Authority, 387 Mass 687 (1982).

possible sources of the funding. As negotiations dragged on, the State's fiscal situation worsened and the Glen project was competing for limited funds.

Early consideration was given to the use of Urban Self Help funds. On July 25, 1988, Commissioner Gutensohn advised Secretary Hoyte that those funds were for use by municipalities for municipal parks and recreation lands, whereas Greylock Glen would not be owned or operated by the Town of Adams. State officials even considered transferring ownership of the alpine ski area to the Town so that Urban Self Help funds could be tapped for the project; this idea was rejected by Heritage as impractical.

Various State officials disagreed over both the legality and political wisdom of using different fund sources. For example, Commissioner Kendall sent a memorandum to Alden Raine on October 17, 1989, concerning the legality of using DEM accounts for the Glen project.[17] That memorandum argued that:

-- Open Space Bond funds could be used for land acquisition, and Trails Accounts funds could be used for the development of trails;[18]

-- Forest and Parks Acquisition and Restoration funds could be used for construction of recreational facilities, but not infrastructure;

-- Miscellaneous Rehabilitation Account funds could be used only for rehabilitation of existing

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[17]Another source of funds which was planned for use in the project was $3 million in Public Works Economic Development funds. A March 16, 1990, memorandum from EOEA Undersecretary Gomes to GOED's Bruce Goldman indicated that the Glen project would "totally exhaust the available funds" in that account. Nonetheless, project documents indicated that $3 million would be dedicated to the project by the Executive Office of Transportation and Construction.

[18]Kendall noted, however, that Environmental Affairs Undersecretary William Eichbaum "made a public and written commitment to the environmental community that trails money would not be used for the Greylock Glen project."

facilities -- like the abandoned ski lift and lights -- but not for new facilities; and

-- Rivers and Harbors Account funds could not be used for the proposed pond construction, since they were limited to cleaning, dredging and flood control improvements.

The Governor's legal counsel, attorneys in GOED, DEM, DCPO, outside counsel and others were all drawn into the dispute. Apparently, no final resolution was reached.

Apart from the legal issues, officials vigorously debated the politics of tapping certain accounts for the Glen project. The competition for funds is underscored by a February 13, 1990, memorandum by DEM Deputy Commissioner Kathy Abbott. She wrote:

> The [GOED] is continuing its search for funding sources for the Greylock Glen project. Despite legal and political arguments presented by [DEM], the Governor's staff has focused on . . . [the trails accounts, the miscellaneous rehabilitation account, the forests and parks acquisition and restoration account, and the city and town commons account].
>
> Our next defense for these accounts is to describe the work, acquisitions, or projects which will not be funded if these monies are diverted to the Glen project.[19]

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[19]In a February 15, 1990, memorandum to Abbott, DEM's project manager detailed the available funds and spending priorities in three of the accounts: trails, miscellaneous rehabilitation, and forests and parks acquisition and restoration. The trails accounts had an available fund balance of almost $5 million, but just ten of the "twenty five most important" planned acquisitions required more than was available. The miscellaneous rehabilitation account had an available balance of just over $8 million, but DEM had "identified 197 priority one expenditures from this account" with a total project cost of $33 million. "These activities are of special concern due to public safety or property protection considerations," he wrote. Finally, the forests and parks acquisition and restoration

(continued...)

One particularly awkward issue was the use of the forests and parks account, which some State officials regarded as a likely source of funds for the Glen project at least since April of 1988. In the many internal memoranda on funding, this account was referred to as the "Lawrence pools" account because the money had earlier been earmarked for the construction of swimming pools in Lawrence. According to a March 16, 1990, memorandum from EOEA Undersecretary Jim Gomes to GOED's Bruce Goldman, the Administration was considering tapping the $4 million available in this account for $2.1 million of the Glen shortfall, yet the estimated cost for the pool project required the full $4 million. Gomes wrote:

> How strong is the Administration's commitment [to] the Park St. Pool Project? Obviously, if we take $2.1 M of this account for Greylock, insufficient funds will remain to build the pool. If this account goes only for the pool, the Greylock project will experience a $2.1 million shortfall. The only place anyone has identified to make up this amount is the beleaguered Miscellaneous [Rehabilitation] account, which would be left to pony up $4.9M . . . Under this scenario, more than 60% of the Commonwealth's available park rehabilitation funds would be spent on one project, Greylock Glen.

At least some members of the Administration were concerned with the political consequences of diverting the funds from Lawrence to the Glen project. Handwritten meeting notes, apparently from a meeting on March 20, 1990, included: "Wary about Pat McGovern (Lawrence Pools Money)." (Emphasis in original.) Senator McGovern of Lawrence chairs the Senate Committee on Ways and Means.

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[19](...continued)
account had an available balance of $4 million, all of which was slated for construction of a Park Street Pool in Lawrence.

In an October 1, 1990, memorandum to State officials, Alden Raine noted that the then-current draft LDA required the State to establish a project account and transfer into it the entire $16.5 million. He said, "It is essential that we complete this process immediately: as a practical matter neither side should sign the LDA unless this procedure is complete."

In the end, the Dukakis Administration decided to leave to the Weld Administration the problem of deciding where to find the funds to honor the unwritten commitment made to Heritage two years earlier. DEM's project manager noted in a December 5, 1990, memorandum that he had spoken to GOED's Bruce Goldman who indicated that the Governor's attorney concluded that the disputed funds legally could be used. The memorandum continued: "However, [Goldman] said that the sources of funds were no longer to be included in the LDA. That issue would be left for the next administration to decide."

5. The project is a high-risk investment for the State.

If the project negotiated with Heritage could legally proceed, the State's investment under the draft LDA would be approximately $ 16.8 million.[20] In addition, the State has already expended $4.1 million to acquire the Greylock Glen property and conservation restrictions on the adjacent farm land, and $2 million in Chapter 676 funds for project development. This public investment has a substantial risk

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[20]This is the total of the additional expenditures the State would make beyond the $6.1 million already spent. The State's on-site development commitment would be $16.5 million, and the estimated cost of acquiring additional property interests would be another $300,000. This figure does not include additional funding for off-site improvements, including possible assistance to the Town to meet its contributions to off-site improvements.

of yielding few of the benefits which have been cited as reasons for proceeding with the project.

The development proposed for Greylock Glen is inherently risky, even under more promising economic circumstances than the current economy affords. In a May 2, 1988, financial analysis of the proposed project, Halcyon Ltd., the State's economic consultant, stated: "As proposed, Greylock Glen represents one of the most complex and most risky forms of development." Indeed, the State's investment in the project was intended in part to reduce the developer's risk.[21]

The worsening economy, the increased State investment, and the decreased Heritage commitment have combined to put more public money at greater risk. The full recreational and economic benefits trumpeted for this project may never be realized; quite possibly, no development will occur even after the State has spent a considerable sum.

As previously discussed, the draft LDA would grant to Heritage a three-year option period. The last-minute addition of this option to the draft LDA is an acknowledgement that Heritage is unlikely to go forward with the project under current economic conditions.

Governor Dukakis' December 21, 1990, press release concerning the draft LDA noted, "This Agreement . . . recognizes that current economic conditions throughout the Northeast require that the Commonwealth and the developer

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[21]The State stepped in to assist the development of the site after several private efforts failed. The 1988 DEM Master Plan stated: "In recognition of the difficulty of financing a development of this magnitude, the State will develop all the major on-site amenities and infrastructure, acting as a 'land bank' over a long term period, while the designated developer concentrates on management, marketing and construction issues. Acting as a land bank also provides another advantage to the project; it enables the development to proceed in a more orderly fashion because the cash flow risks to a developer are minimized."

have the patience to stick together, ride out the recession, and start building when market forces allow."[22]

Under the draft LDA, the State may be obliged to invest in the project only to find that Heritage can walk away from the deal. Commissioner Kendall argued this point in a February 28, 1990, memorandum to Secretary DeVillars:

> . . . the [draft] LDA allows [Heritage] several loopholes by which it may withdraw from the project after the Commonwealth has expended significant funds. For example, [Heritage] can withdraw from the project if it cannot obtain financing for its required improvements within the two year conditions precedent period.[23] Likewise, [Heritage] can abandon the project by refusing to pick up any shortfall exceeding one million dollars over the Commonwealth's $16.5 million budget . . . Everyone involved in the [draft] LDA already expects that the Commonwealth's shortfall will exceed the one million dollar mark.
>
> During the two year . . . period, DEM is responsible for most of the expenditures needed to complete the conditions precedent. . . During the course of the negotiations on the [draft] LDA, the front-end risk for the project has shifted from [Heritage] to DEM. [Heritage] can wait out the two year . . . period at minimal expense and examine the market. If the market is not favorable, [Heritage] can use one of its loopholes to pull out from the project leaving the Commonwealth no recourse to recoup its investment from [Heritage].

The provisions that troubled Commissioner Kendall remain in the current draft LDA.

Under the LDA, were the project to proceed to closing, the State would transfer the title of 385.4 acres to Heritage for

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[22]Earlier, in an October 1, 1990, memorandum to State officials, Alden Raine wrote, "The market will determine when development of the Glen can begin. Obviously, current economic conditions will not allow large-scale private development, particularly second homes, to be financed."

[23]This memorandum was written before the three-year option was added to the conditions precedent clause.

no consideration at the closing.[24] Within two years of the closing, the Commonwealth would be required to construct the primary roadways and utility systems (water, sewer, electric, telephone, and gas), and the three ponds. Off-site roadway and utility improvements must also be constructed within two years.[25]

Heritage would then be required, within three years of the closing date, to complete construction of the golf course, a golf pro shop/nordic ski center, and a boulevard. Within five years of the closing date, Heritage would also be required to construct the country club.

Thus, five years after the closing, and potentially ten years after signing the LDA, having constructed improvements which may never be used, the State may see the construction of a golf course, a country club, and a pro shop. Even that much private development is uncertain.

Heritage would commit to no more in the draft LDA. Many improvements, including the entire nordic system, the retail/commercial space, the inn, the amphitheater, and the skating rink, are all contingent upon Heritage's ability to sell condominiums. Moreover, some elements of the project are entirely optional for Heritage: the inn buildout from 80 to 200 rooms, the retail/commercial space buildout from 6,000 to 40,000 square feet, the fitness center, eight tennis courts, and the town common.

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[24]Some consideration for the property may be paid in the future. See Finding 6 below for a discussion of the consideration.

[25]The draft LDA does not specify who is responsible for funding and constructing the off-site improvements. However, as a condition precedent to closing, DEM would be responsible for obtaining written commitments to make such improvements by "appropriate public authorities and utility companies." It appears likely that the State would be called upon to fund at least some of these off-site improvements.

The draft LDA would give Heritage 50 years to develop the property. Only after the expiration of 50 years would any unimproved property revert to the State.[26]

There is also a considerable risk that disputes concerning the facilities to be constructed by the State and Heritage will stall the project. The draft LDA relies on Heritage's master plan to define these facilities. However, despite the many months of negotiation over the project, Heritage's plan has been criticized by DEM and DCPO as lacking sufficient specificity.

On May 31, 1990, Commissioner Kendall wrote to Heritage concerning the master plan and raised concerns about the plan's vagueness. He wrote that, although some of the improvements were sufficiently detailed, "Others . . . require further detail to protect either [Heritage] or DEM from future claims that a designed improvement satisfies or does not satisfy the [plan] requirements. Among these are the ponds, swimming pools, tennis courts, amphitheater, village common, skating rink, conference center, roads, and utilities." Kendall listed specific details that should be added to the plan. On November 12, 1990, DCPO Deputy Commissioner Carlson reiterated that the draft plan did not provide sufficient detail on the improvements.

Heritage did make some changes in the plan, but the current draft still lacks many of the details that Kendall and Carlson called for. For example, Kendall recommended that the plan identify the function or purpose of each improvement and its intended audience or user. He asked, "[A]re the swimming

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[26]The reversion clause in Section 414 is vague. It states that property will revert to the State if, within 50 years, the property has "not been improved, as provided in the Master Plan, by the construction of either residential or commercial facilities . . . ." It is not clear, for example, whether failure to develop the entirely optional conference center/health fitness resort, would mean that the 26 acres set aside for that purpose would revert to the State.

pools designed to serve the recreational needs of the Adams community and/or Heritage Greylock residents or are the pools part of the fitness program for fitness center members?" The current plan merely says that access to the two pools -- one at the conference center and one at the fitness center -- will be "[p]ublic by fee."

On December 19, 1990, DEM's project manager informed Commissioner Kendall in a memorandum, "Despite numerous requests to provide additional detail in the [Heritage plan], it still is a sketchy document with substantial 'flexibility.'"

6. The draft LDA provides for a low direct financial return to the Commonwealth; the low return has not been justified.

Section 8 of Chapter 676 states that DEM must "require a reasonable return from the developer . . . and . . . deposit all revenues collected pursuant to the provisions of this section in the state recreation areas fund." The draft LDA would require Heritage to pay little to the Commonwealth, and any payment would be conditional.

The draft LDA would require the State to convey to Heritage at the closing the entire 385.4 acres of land that Heritage would develop under its plan, even though most of that land will not be developed for years, if ever. A proportional estimate of the value of this unimproved land, based on the State's $3.6 million acquisition of the entire 1,040-acre Greylock Glen site, would put the value at something like $1.4 million. However, under the draft LDA the State would be required to improve the property by building major elements of the infrastructure and portions of the recreational amenities, increasing the value of the land conveyed to Heritage.

Heritage, however, would pay nothing for land at the closing. Instead, its consideration would be due sometime in the future when -- and if -- Heritage sells condominiums or land to other parties.

Payments would be due the State under two circumstances. First, after selling 325 condominium units, Heritage would pay, on a sliding scale, a percentage of the gross sales price for each additional unit sold.[27] For example, the State would receive nothing for the first 325 units sold, and would receive one-quarter of one per cent for each of the next 125 units sold. If all 850 units were sold at $200,000 (the selling price assumed in pro formas) the State would receive $912,500, slightly more than one-half of one per cent of the gross sales revenue and only 65 per cent of the prorated value of the land. If fewer units were sold, the State's modest return would be even less. For example, if all but 100 of the units are sold, the return to the State decreases by $400,000 (44 per cent) to $512,500.

Second, if Heritage sells unimproved land to another developer, Heritage would be required to pay the Commonwealth a percentage of the gross sales price according to a declining scale (30 to 0 per cent) pegged to the completion of conditional improvements Heritage may make under the draft LDA.[28] It is unclear what, if any, return the Commonwealth is likely to receive under this provision: project pro formas do not reflect any planned sales of unimproved land.

Notably, Heritage would make no payment upon the sale of any improved property other than the 850 housing units. For example, Heritage could construct the proposed Village Inn and then sell the Inn, with no payment due the State. Similarly, the Village Inn could be established as a condominium hotel as assumed in project pro formas, and the State would realize no return from the sale of interests in the Inn.

In addition to receiving title to the private property, under the terms of the draft LDA, Heritage would be granted a lease to operate facilities on the property that will remain

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[27]See Section 1701(a) of the draft LDA.

[28]See Section 1701(b) of the draft LDA.

publicly owned. Heritage's annual rent payment to the State under this lease would equal one and one-half per cent of Heritage's gross receipts from its operation of improvements on the publicly owned land. However, no payment would be due: 1) on receipts from the golf course and golf pro shop/nordic ski center until 10 years after any part of the golf course opens; 2) on receipts from the nordic ski system until 15 years after any part of the system opens; and 3) on receipts from the skating rink and amphitheater until five years after some unspecified event occurs.[29] Given the development schedule and the deferral period, it is unlikely that any rent revenue would be realized by the State anytime soon.

All payments due the Commonwealth -- for consideration for the land conveyance and for rent -- would be reduced by 50 per cent in the event and to the extent that Heritage decides to make up the difference between what the State has committed to project improvements ($16.5 million) and the actual costs of the State's improvements above $17.5 million.[30]

These payment terms, despite statutory requirements, have not been justified as "reasonable." The last analysis of the

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[29]See Section 1702. As drafted, this section leaves unclear the rent requirement related to operations of the skating rink and amphitheater. Section 1702(h)(iii) states: "With respect to rents based on gross receipts from the Skating Rink and Amphitheater, five (5) years from the is opened to the public." (Sic).

[30]No reliable estimate has yet been made of the cost of the on-site improvements the Commonwealth would be obliged to fund under the draft LDA. That is why the draft LDA provides that such cost estimates must be made prior to the transfer of property to Heritage. If the estimate exceeds $16.5 million, Heritage would be responsible for paying up to $1 million more to complete the improvements. If the estimates exceed $17.5 million, Heritage has the option to terminate the agreement -- one of the "loopholes" Commissioner Kendall identified in his February 28, 1990, memorandum to Secretary DeVillars. In that memorandum Kendall also stated: "Everyone involved in the [draft] LDA already expects that the Commonwealth's shortfall will exceed [$1 million]."

project performed by the State's consultant, Halcyon Ltd., is dated February 14, 1990. Halcyon evaluated the project assuming higher payments to the State associated with condominium sales: if all 850 units sold, the State would have received $1,262,500 (versus $912,500 in the draft LDA) and would begin to receive payments after the sale of 150 units (versus 350 units in the draft LDA). Using these assumptions, the consultant concluded that the project would "attain a minimum feasible level of financial performance." Notwithstanding this conclusion, a lower return to the Commonwealth was negotiated for the final draft LDA.[31]

Officials in DCPO and DEM have questioned the reasonableness of the financial return to the Commonwealth. In his February 28, 1990, memorandum to Secretary DeVillars, Commissioner Kendall noted that under the then-current payment terms, "Despite a huge investment by [DEM], we can expect at best a modest return which we will depend on for our operations." He continued:

> These unprecedented terms have always been questionable. Given the revised plan and current economic trends, this project has become increasingly risky and these provisions increasingly unacceptable. You, [Deputy Commissioner] Carlson and I will undoubtedly be asked to respond to each of these issues when the terms of the LDA become public. More importantly, long after you and I are gone, [DEM] and the Commonwealth will have to live with this agreement.

In a May 9, 1990, memorandum to Kendall and Carlson, DCPO and DEM counsel raised a number of legal issues about the draft LDA. They noted the requirement for DEM to certify that the return is reasonable, and that the Deputy Commissioner would be required under G.L. c.7, §40H to publish a justification for

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[31]No evidence was found in the project documents to suggest that Heritage ever accepted the payment terms analyzed by Halcyon.

any decision to convey and lease property to Heritage for less than fair market value. They wrote:

> In our opinion, the disposition appraisal should be undertaken in the near future . . . The purpose of this evaluation process would be to determine whether the project as currently structured, including the expected return to the Commonwealth from all sources, meets the statutory requirement for a "reasonable return", and that with respect to the land transfer, any differences from the appraised value can be justified in writing . . .[32]

As recently as December 19, 1990, DEM's project manager and its counsel wrote memoranda to Commissioner Kendall questioning the payment terms and noting that they were well below the amounts suggested in 1989 by DEM's outside counsel.[33]

7. <u>There is a substantial question whether the proposed arrangement would violate the State's designer selection and construction bid laws</u>.

The Office of the Inspector General provided the Department of Labor and Industries (DLI) -- the State agency charged with enforcing the designer selection and construction

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[32]A copy of this same memorandum from GOED has the following handwritten note from Raine: "We met on this - Dick Kendall is fine on the project; is concerned <u>re</u>: how we state in writing why we conveyed the land for $0 (but he's <u>ok</u> on doing it). This memo is troubling, it's privileged, isn't it?"

[33]The Dukakis Administration did consider other returns in addition to the direct financial return to the Commonwealth. These include the value of the recreational amenities and the economic benefits to the Town of Adams and the region. However, as already noted, Commissioner Kendall expressed concern that recreational opportunities diminished and State expenditures increased as the project changed. No current analysis has been performed of the economic benefits that would result from execution of the draft LDA. The most recent analysis by Halcyon evaluated outdated LDA terms and relied on what are now clearly optimistic assumptions about the likely pace of development.

bid laws -- with copies of Chapter 676 and the draft LDA. DLI's legal counsel reviewed the material and concluded that it appears the draft LDA, if executed, would violate both the designer selection and construction bid laws.[34]

The draft LDA would be an agreement for, among other things, the acquisition of "public use improvements" constructed on that portion of Greylock Glen that would remain publicly owned. The draft LDA assigns responsibilities to Heritage and DEM for design and construction of specific improvements.[35] Heritage would own title to any improvements it constructs on the publicly owned land only for the term of its master lease for the land; when the lease expires, the title would vest in the Commonwealth.[36]

Chapter 676 provided only a very limited exemption from the designer selection law[37] and no exemption from the construction bid laws.[38] The buildings that would under the

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[34]DLI's counsel followed the legal analysis contained in two opinions rendered by his agency: a June 29, 1989, decision regarding the Massachusetts Water Resources Authority's headquarters acquisition; and an August 22, 1989, decision regarding the Town of Nantucket's solid waste compost facility.

[35]For example, Heritage would design and construct the golf course and clubhouse and DEM would design and construct the primary roadways and utilities, and the amphitheater. In the case of the three ponds and the norpine ski area, Heritage would do the design and DEM would do the construction.

[36]All the publicly owned land would be leased to Heritage for a period of 50 years, and Heritage would have the right to renew the lease for two successive 20-year terms.

[37]G.L. c.7, §38A½ et seq.

[38]Section five of Chapter 676 limited the applicability of the statutes concerning designer selection, the jurisdiction of the Division of Capital Planning and Operations, and the acquisition, disposition, and control of real property. Their application was limited "[e]xcept as expressly specified in this act . . ."

Section 7 of the act makes clear that the exemption from

(continued...)

draft LDA be designed and constructed by Heritage on the public land appear to be public building projects. Heritage was not selected through the designer selection process to design the buildings, and it did not competitively bid under the public building construction bid laws[39] to construct the buildings.

Although the non-building components of the project on the publicly owned lands would normally be "public works," the construction of which must be bid under G.L. c.30, §39M, in this case the entire project would likely be subject to the building construction bid laws. The Supreme Judicial Court has ruled that when, as here, a contract would require the construction of both public works and buildings, all construction components must be bid under the public building construction law.[40]

8. The Dukakis Administration's failure to follow a coherent development plan is largely responsible for the delay and controversy that have characterized the project.

The requirement for a master plan and report to the General Court was included in the Greylock Glen legislation precisely because the planning for the development was then incomplete and its feasibility had not been reasonably established.

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[38](...continued)
the designer selection law was limited to allowing DEM -- rather than the Deputy Commissioner of DCPO -- to select the master planner. Otherwise, the master planner had to be selected according to the designer selection laws. The last sentence of Section 7 states: "Any public building projects on [Greylock Glen and the abutting reservation] shall be subject to [the designer selection law]."

Section 8 of the act provides: "The design and construction of any public building project shall be subject to the control and supervision of [DCPO]; . . ."

[39]G.L. c.149, §44A et seq.

[40]Modern Continental Construction Co., Inc. v. City of Lowell, 391 Mass 829 (1984).

DEM produced the required plan in 1986, and filed the required report in 1987. That plan, which appears to have reflected a fairly broad consensus among various political interests, could and, by statute, should have served to guide the disposition and keep the project on course. Instead, the plan was disregarded from the beginning, with the selection of Heritage's unresponsive proposal. Negotiations between Heritage and State officials proceeded with little regard for the enabling statute and the master plan which that statute required. The project drifted substantially away from the plan, and even from Heritage's proposal. Without a coherent State plan to guide the way, negotiations dragged on for three and one-half years.[41]

Departure from the original plan triggered disputes within the Administration, added immeasurably to the complexity of negotiations with Heritage, and fueled opposition by environmental organizations and Administration officials to whom the original master plan was acceptable. In a memorandum to the Governor in June, 1988, concerning the then-pending final EIR decision on the 1275 condominium unit Heritage plan, Alden Raine wrote:

> There is significant and growing environmental opposition to Heritage Greylock . . . .
>
> [E]nvironmentalists are almost unanimous in their view that the project is "just too big" with 1275 condos,

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[41]Numerous DEM documents predicted that the LDA would be negotiated in short order. For example, the November 7, 1986, Phase II RFP included a schedule which stated that the elapsed time between the preliminary designation of a developer and conclusion of the LDA negotiations would be 41 days. Then again, in an April 23, 1987, memorandum, Commissioner Gutensohn noted that it would take two to three months to negotiate the final LDA. Given the vagueness of the master plan and the paucity of specified LDA terms, these expectations were naive. Nonetheless, LDA negotiations could have moved much more swiftly had the original plan been better defined and, more importantly, had it been followed.

> . . . and that in securing their support for the enabling legislation we never suggested anything of this scale.
>
> [EOEA Undersecretary] Eichbaum is trying to uphold administration policy on Greylock, but he believes that approving this project is a very serious mistake, one which will create a national outcry like Attleboro Mall. There is no question that mainstream environmental leaders . . . are ready to denounce a MEPA approval and perhaps even to litigate . . . . Within the government, some agency people are ready to make negative MEPA comments . . . .

Officials within DCPO and DEM, the two agencies with statutory responsibilities for safeguarding the State's interests in this project, as well as other State officials with environmental responsibilities, raised numerous concerns as the project proceeded. In a November 14, 1989, memorandum to Secretary DeVillars, Commissioner Kendall objected to DEM's role in the project:

> DEM must not be a promoter of this or any development which has among its primary goals, property sales and permanent, privately owned real estate.
>
> The very credibility of DEM has been deeply compromised by the advocate role it has been playing. . . .
>
> Since my initial briefs I have questioned DEM's role. It is critical that a balanced perspective be presented. I'm sure that [EOEA Undersecretary] Gomes has kept you informed of my legal and policy concerns.

Kendall concluded his memorandum with, "I'm increasingly convinced that DEM is plunging over a cliff."

In the face of the disagreement within the Administration, the Greylock Glen project was largely shepherded by GOED. This is especially evident during the last year. On January 24, 1990, Alden Raine urged the Governor to schedule a series of meetings with DeVillars, Kendall, Carlson, Raine and others "for the purpose of 'driving' . . . two critical projects,"

Greylock Glen and the Massachusetts Museum for Contemporary Arts (MoCA). He wrote:

> Both projects are languishing, and . . . it is clear that over the next critical month, these projects will require the accountability that only the Governor's active, agenda-driving involvement can bring.
>
> On Greylock, there is fundamental disagreement between parts of the environmental bureaucracy and ourselves over whether or not to approve the MEPA project change as proposed -- a drop dead issue. If we get by that one, there is a great need to drive the completion of the LDA negotiations, the writing of the "Section 61" findings, and the definitive allocation of environmental bond funds to this project. All are likely to be contentious, and we're running out of time and credibility.

On February 10, 1990, Raine wrote another memorandum to the Governor concerning an upcoming second meeting on the same two projects. His status report on the Glen project included the following concerning the MEPA project change: "John [DeVillars] has given me a new draft letter, which meets the basic requirement--i.e., approval of the change with no supplemental EIR. . . I've got some problems with the tone and detail of John's new draft; I'll need a word from you reinforcing my referee's status on working these out. . . ."[42]

On October 1, 1990, Raine wrote a memorandum to Kendall, Carlson, DeVillars and Administration and Finance Secretary Lashman. He said, ". . . we have three months to secure the threshold public agreements and approvals that are required if

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[42]On February 13, 1990, GOED's Goldman transmitted to EOEA's Gomes a marked-up copy of a February 7, draft of DeVillar's letter to Heritage concerning the notification of project change. Most of the GOED edits were contained in DeVillar's final letter which was issued on February 16. For example, the previous draft stated, "I am troubled by the fact that the total area proposed to accommodate the single family residences, excluding the village housing, is about 220 acres." The underlined phrase was toned down by a GOED edit to read, "In the new proposal, . . ." (Emphases added.)

Greylock Glen is to proceed. [T]his project remains a high personal priority of the Governor's." He went on to discuss the need to complete four tasks: DEM and DCPO's joint filing of the required Section 61 findings; DEM's approval of Heritage's plan; signing the LDA; and identifying the sources of the $16.5 million and transferring the funds to a separate project account.

In the end, only the first task was completed. On October 31, 1990, the draft Section 61 findings were submitted to Secretary DeVillars. On January 2, 1991, his last full day in office, the Secretary issued his certificate on the findings.

CONCLUSION

The Dukakis Administration's failure -- despite three and one-half years of intense effort -- to negotiate a valid and prudent agreement for developing Greylock Glen demonstrates the necessity for establishing a coherent plan before the State selects a private partner in any transaction, and then following that plan. The State must carefully determine its needs, and not allow those needs to be compromised by any single developer or contractor after others have been turned away. A clear, detailed, comprehensive plan should always guide the selection process as well as the implementation of the project.

The alternative -- exemplified by Greylock Glen -- is endless negotiations, lurching changes in the deal, and forfeiture of the Commonwealth's opportunity to reap the benefits of vigorous competition.

In his January 24, 1990, memorandum to Alden Raine concerning the Heritage plan for Greylock Glen, Commissioner Kendall argued that the evolving scheme no longer served the original purposes of the project as stated in Chapter 676 and DEM's Master Plan: public recreation and economic development. He wrote:

> The recreational activities have always been the heart . . . of the Greylock Glen project. They are the source of the Commonwealth's public purpose and the incentive for [Heritage's] hoped-for home sales. But numerous decisions, actions, processes, and regulations have steadily constricted the project's recreation program to the point where it no longer serves as the engine which draws visitors to the region and pumps new dollars into the north Berkshire economy.
>
> If we can't accomplish our intended goal with the plan currently available to us, let's acknowledge that situation rather than push forward with a compromise that doesn't meet the needs of either [Heritage] or the Commonwealth.

Kendall's advice was sound. Moreover, without legislative authorization to proceed with this deal, any agreement which departs so significantly from statutory requirements is vulnerable to legal challenge.

Realistically, this project is already on hold. This development, as currently outlined in the Heritage plan and reflected in the draft LDA, will not happen any time soon, if at all.

The new Administration must first decide whether it wishes to proceed with a development project. This Office makes no recommendation as to whether or not development should be pursued.

However, if the new Administration decides to proceed with a development project at Greylock Glen, then the Administration should take the following actions:

1. Terminate further negotiations with Heritage;
2. Rewrite the State's master plan to meet the State's needs;
3. Rewrite the land disposition agreement and related documents to meet the State's needs;
4. Submit the new master plan and a revised report on the planned development to the Legislature pursuant to Chapter 676; and
5. Advertise for a developer to implement the State's new master plan, under the terms of a revised LDA, at an appropriate time consistent with improving economic conditions.